Supreme Court, U.S.
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No. 00-

IN THE
SUPREME COURT OF THE UNITED STATES

FRED MASSANOVA and
STEVEN IMMENDORF,

Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

==========

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the Due Process Brady/Giglio doctrine and Fed.R.Crim.P. 26.2(c) (the "Jencks" Rule) bar a district court from withholding the report of an informant witness's extensive debriefing about his drug-dealing activity "in the interests of keeping the government's ongoing investigation confidential," or because that material "is not directly relevant to [either defendant's] role in the conspiracy," when the defense claims that the informant is implicating the defendants to protect other confederates?

2. Do federal criminal defendants have a right, under the Confrontation Clause or otherwise, to cross-examine a key government witness about the witness's admission to having committed an unprosecuted double murder?

3. Did the courts below disregard this Court's controlling standard for "custody" under Miranda v. Arizona, 384 U.S. 436 (1966), when they determined that petitioner Massanova was not entitled to warnings before being interrogated at his kitchen table for up to two hours by armed agents, who entered his home bearing a search warrant at 6 a.m., and who would not let him leave their sight, even to dress or use the bathroom?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Fred Massanova, Steven Immendorf, and the United States). Four co-defendants were named in the indictment, but none stood trial or appealed, and they are not parties to this or any related petition.

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2. The decision of the court below upholding the trial court's refusal to allow cross-examination of a key government witness about the witness's admission to having committed an unprosecuted double murder flouts this Court's precedent under the Confrontation Clause allowing a defendant to show bias 14

3. The courts below misapplied this Court's controlling standard for "custody" under Miranda v. Arizona, 384 U.S. 436 (1966), and deviated from other Circuits' rulings, when they determined that petitioner Massanova was not entitled to warnings before being interrogated at his kitchen table for up to two hours by armed agents 20

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

FRED MASSANOVA and STEVEN IMMENDORF respectfully petition this Court for a writ of certiorari to review the judgment and memorandum opinion of the United States Court of Appeals for the Third Circuit filed and entered on October 25, 2000.

OPINIONS BELOW

The opinion of the court of appeals (per Scirica, J., with Sloviter & Fuentes, JJ.) is not published. It is noted at 242 F.3d 372 (table), and a copy is Appendix A to this petition. The district court's opinion denying post-trial motions is not published but is available as United States v. Massanova, 1999 WL 761136 (E.D.Pa. 1999); a copy is Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit affirming the petitioners' convictions and sentences was filed and entered on October 25, 2000. Appendix A. A timely joint petition for rehearing was denied by Order dated December 6, 2000. Appendix C. On February 27, 2001, under No. 00A739, Justice Souter extended the time for filing this petition on application of petitioner Massanova to and including May 4, 2001. This petition is timely filed on or before that date. Rules 13.1, 13.3, 30.1; 28 U.S.C. § 2101(c).[1] Petitioners invoke this Court's jurisdiction

[1] Counsel neglected to include petitioner Immendorf's name

under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, FEDERAL STATUTES AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part: "... nor shall any person ... be compelled in any criminal case to be a witness against himself ...."

The Sixth Amendment to the Constitution of the United States provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ...."

The "Jencks Act" provides, in part:

§ 3500. Review of a sentence

* * * *

(b) After a witness called by the United States has testified on direct examination, the court shall, upon motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relates to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section

_____(cont'd)

on that application. Accordingly, this petition is filed out of time, although not jurisdictionally so, as to Immendorf. See Schacht v. United States, 398 U.S. 58, 63-64 (1970).

contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for inspection to the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such matter excised, the court shall then direct delivery of such statement to the defendant for his use. If pursuant to such procedure any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. * * * *

18 U.S.C. § 3500. Similarly, Rule 26.2 of the Federal Rules of Criminal Procedure provide, in part:

> (a) **Motion for Production.** After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the defendant, shall order the attorney for the government or the defendant and the defendant's attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.

(b) **Production of Entire Statement.** If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the court shall order that the statement be delivered to the moving party.

(c) **Production of Excised Statement.** If the other party claims that the statement contains privileged information or matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that are privileged or that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of the statement that is withheld from the defendant over the defendant's objection must be preserved by the attorney for the government, and, if the defendant appeals a conviction, must be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.

* * *

(f) **Definition.** As used in this rule, a "statement" of a witness means:

(1) a written statement made by the witness that is signed or otherwise adopted or approved by the witness;

(2) a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making

of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or transcript thereof; or

(3) a statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury.

* * * *

Federal Rule of Evidence 611(b) provides, in pertinent part, that:

(a) **Control by court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) **Scope of cross-examination.** Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

* * * *

STATEMENT OF THE CASE

This petition presents important questions concerning the nondisclosure of evidence needed for cross-examination and the meaning of "custody" under the Miranda doctrine when a person is interrogated while being detained in his own home. The Third Circuit upheld the petitioners' convictions, after a joint jury trial, for dealing in marijuana.

a. Procedural History

A federal grand jury in the Eastern District of Pennsylvania charged petitioners Massanova and Immendorf and four others, on December 16, 1998, in a three-count indictment. Count One alleged a conspiracy in violation of 21 U.S.C. § 846 to distribute marijuana, between at least June 1994 and about July 1996, among Massanova, Immendorf, the co-indictees and four unindicted co-conspirators, plus those unnamed, to distribute marijuana, contrary to 21 U.S.C. § 841(a). Counts Two and Three charged Immendorf alone with violating id. § 856 (maintaining a marijuana storage location) and § 841 (distribution) in 1998. The indictment also contained notice of forfeiture pursuant to 21 U.S.C. § 853 and 18 U.S.C. § 3665, tied to the previous counts of the indictment.

Petitioners filed pretrial motions, including one by petitioner Massanova to suppress oral statements. Following a hearing, the district court announced certain findings of fact, CA3 J.A. 125-32, and granted the motion to suppress in part, while also denying it in part. J.A. 135, 137; see also CA3 J.A. 250 (written order).[2]

On May 3, 1999, after a four-day jury trial, petitioner Massanova was convicted on Count One, and petitioner Immendorf on Counts One through Three, as charged. By memorandum and order filed September 21, 1999, post-trial motions were denied.

[2] Petitioner Immendorf's related motion for severance, CA3 J.A. 41, was also denied. CA3 J.A. 251. Immendorf renewed the motion at least twice at trial and was again denied. CA3 J.A. 261-66, 272, 456.

App. B; United States v. Massanova, 1999 WL 761136 (E.D.Pa.).

The sentencing hearing was held October 28, 1999, at which testimony was taken and a number of exhibits were received. The court found that the "relevant conduct" totalled 2000 pounds, less than a thousand kilograms of marijuana. Determining guidelines of 151-188 months, the court then sentenced petitioner Massanova to serve 151 months' (12½ years') imprisonment, followed by four years' supervised release, and to pay a fine of $15,000 and a $100 special assessment. CA3 J.A. 586-87.[3] Immendorf was sentenced to serve 97 months, followed by four years' supervision, and to pay $300 in assessments. CA3 J.A. 595.

On appeal, the Third Circuit affirmed. Appx. A. Rehearing was denied. Appx. C.

b. Statement of Facts

The facts as related at trial are set forth in detail in the district court's opinion, App. B, as follows:

> The government presented evidence that, from 1994 to 1996, Massanova and his cousin Immendorf were involved in marijuana trafficking. Massanova supplied money to a man named Clifton Cato, who arranged for the actual purchases of marijuana in Arizona and occasionally Philadelphia. Cato testified for the government. Sometimes Massanova provided him with

[3] The district court also entered criminal forfeitures of a house, a business property, $650,000 in currency, and certain municipal bonds.

money up front, before a trip west to purchase marijuana, and sometimes Massanova bought marijuana from Cato after Cato had it delivered to Philadelphia. At the direction of Massanova, from time to time Cato also picked up money from Immendorf. Meetings between Cato and Massanova to arrange for purchases took place at various locations, including Massanova's home and his sandwich shop in Philadelphia. Massanova and Cato recruited people to courier the marijuana from Arizona to Philadelphia. One of the couriers was Richard Bessinger, Sr., who also testified for the government. Cato estimated that from 1994 to 1996 he made over 30 trips west to purchase marijuana and sold Massanova approximately 4,000 pounds of it.

According to Cato, on numerous occasions Massanova arranged for the marijuana to be delivered to Immendorf's home on Longspur Place in Philadelphia. Immendorf (and sometimes Massanova) supervised the deliveries, weighed the marijuana, repackaged it into smaller plastic bags, and stored it in a "hidden compartment" under the stairway in Immendorf's basement.

Appx. B3.

c. Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii)

The United States District Court for the Eastern District of Pennsylvania had subject matter jurisdiction of this case under 18 U.S.C. § 3231; the indictment alleged federal offenses committed there. The court of appeals had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. §§ 3742(a),(b).

REASONS FOR GRANTING THE WRIT

1. The lower courts' decisions allowing the government to withhold the report of an informant witness's extensive debriefing about his drug-dealing activity "in the interests of keeping the government's ongoing investigation confidential," or because that material "is not directly relevant to [the defendant's] role in the conspiracy," when the defense claims that the informant is implicating the defendant to protect other confederates, cannot be reconciled with the Rules, the Constitution, or this Court's precedent.

The courts below allowed the petitioners' right to a fair trial to be subordinated to an asserted governmental interest in continuing the investigation of others, in contradiction of this Court's precedent of the past 40 years or more. The Due Process principle developed in this Court's Brady and Giglio cases,[4] and implemented in part through Fed.R.Crim.P. 26.2(c) (the "Jencks" Rule[5]) does not permit a district court to withhold the report of an informant witness's extensive debriefing about his

[4] Giglio v. United States, 405 U.S. 150 (1972); Brady v. Maryland, 373 U.S. 83 (1963); see also Strickler v. Greene, 527 U.S. 263 (1999); Kyles v. Whitley, 514 U.S. 419 (1995); United States v. Bagley, 473 U.S. 667 (1985).

[5] So called because it extends and further implements the "Jencks Act," 18 U.S.C. § 3500, which in turn modifies and implements this Court's decision in Jencks v. United States, 353 U.S. 657 (1957).

drug-dealing activity "in the interests of keeping the government's ongoing investigation confidential," as the court below summarized the district court's ruling, App. A14, or because that material "is not directly relevant to [either defendant's] role in the conspiracy." Id. (holding of court of appeals). This is particularly so in a case where, as here, the defense claims that the informant is implicating the defendants to protect other confederates.

The trial court permitted the extensive redaction of the "DEA 6" report of the January 13, 1999, debriefing of government witness Clifton Cato, and of Cato's grand jury testimony, which were otherwise disclosable to the defense as a prior statement either of Cato or of DEA Agent Richard Reck, or under the Due Process Brady/ Giglio doctrine. The redactions from the discovery materials that the prosecutor requested and the lower court authorized violated the "Jencks Act" and rule, Fed.R.Crim.P. 26.2 and 18 U.S.C. § 3500 and the due process Brady principle.

Changing its position from that asserted at trial, the government on appeal sought to defend the district court's decision solely on the ground of "relevance." The court below upheld the district court's flawed reasoning on that latter basis:

> We have reviewed the unmarked material and confirm the redacted material is not directly relevant to Massanova's and Immendorf's role in the conspiracy. As the United States Supreme Court stated in Brady v. Maryland, only relevant material must be disclosed. See 373 U.S. 83 (1963). Since the material does not relate to Massanova and Immendorf's involvement in the conspiracy, the District Court did not abuse its discretion by failing to admit the evidence.

App. A14. The lower courts' decisions cannot be reconciled with this Court's decisions in Jencks v. United States, 353 U.S. 657, 671-72 (1957), and Roviaro v. United States, 353 U.S. 53 (1957). Under the lower courts' improper definition of "relevance," the information is viewed as disclosable only if it is incriminating, and not if it is exculpatory.

From the defense perspective, to the extent that the cooperating witness describes dealing with customers and distributors other than these defendants, his claims that the petitioners were his customers at all, or that certain trips and loads are attributable to them, or that their total dealings reached a certain quantity level (pertinent, at least, to sentencing), become suspect and doubtful. To protect his real confederates, the witness may be falsely implicating suspects, like the petitioners, whom the government has already targeted. Cross-examination on these subjects therefore cannot be properly described as "irrelevant"; it is highly relevant to the witness's credibility and to the central question of guilt or innocence.

At trial, the government did not seek permission to withhold these prior statements of their witnesses on the basis of relevance. Instead, the prosecutor wrote:

> It is the government's position that turning this information over to the defense would seriously jeopardize a legitimate government interest, that is, the ongoing criminal investigations, especially due to the fact that many of the names mentioned in the redacted portions of the documents are personally known to the defendants.
>
> Further, it is the government's position that the defense has been provided with ample information in order to conduct effective cross-

> examination of the government's witnesses without access to the redacted portions of the documents.

CA3 J.A. 123.1. No claim of irrelevance was even suggested. The district court adopted that position in its ruling at trial. CA3 J.A. 138. In denying the post-trial motions, however, the district court changed positions, declaring only that the withheld information was "irrelevant." Appx. B24-25. On appeal, the government also changed horses. Although its brief as appellee reiterated, in passing, that "disclosure of these portions would likely compromise an ongoing investigation," Gov't Br. 33, the government offered no argument to support the notion that discovery can be withheld on this basis in a criminal case. Nor did the court of appeals. App. A14.

Cross-examination material is "relevant" in a rather different sense from that which applies to evidence used affirmatively to establish a case. Only by equating "relevant" with "helpful to the prosecution" does the court of appeals' rationale hold up to examination. The redacted portions may not have been "relevant to the conspiracy at issue in this case," App. B24, or "directly relevant to Massanova's and Immendorf's role in the conspiracy," App. A14, in that distorted sense -- a point that defense counsel were not allowed to be in a position to rebut -- but this same material would surely be highly relevant to impeachment of Cato and Bessinger, on any or all of several bases. For example, the undisclosed material could have been used by the defense to impeach Cato, to identify bias (cf. Point 2 post), to suggest that Cato's testimony against Massanova and/or Immendorf was affected by a desire to protect other, unrelated criminal compatriots, to identify other sources or

customers to undermine Cato's quantity or time estimates,[6] or the like.

The protection of an ongoing investigation is not a legitimate basis to refuse criminal discovery. It has been settled for over 40 years that if the government wishes to protect for its own purposes information to which a criminal defendant would otherwise be entitled, its remedy must lie in dismissal of the pending criminal case, not in compromising the rights of the already-indicted defendant. Jencks, 353 U.S. at 671-72 (1957) (case must be dismissed if government will not produce statements of witnesses "touching the subject matter of their testimony at trial"), and Roviaro, 353 U.S. 53 (balancing of interests appropriate only where government invokes a recognized privilege, and even then defendant's rights may outweigh, as where undisclosed information concerns percipient witness to charged conduct). Here, the government asserted no recognized privilege, such as that which protects the identity of an informer, but only its interest in pursuing the investigation. However legitimate, this mere interest could not outweigh the petitioners' constitutional right to a fair trial, as protected by rules and court decisions.

The petitioners have found no authority for the notion that the government may "have its cake and eat it, too" in this way: to surface its investigation by indicting some defendants, but shift to them the burden of secrecy associated with a decision to continue that investigation. The redacted material should have been disclosed.

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[6] These matters developed critical importance at sentencing, so the withheld material must be considered as affecting both the convictions and the fairness and accuracy of the sentencing proceedings.

The constitutional right of petitioners Massanova and Immendorf to a fair trial, as implemented by statutes and rules, was made improperly in this case to take a back seat to other interests. Just as a governmental interest in continuing an investigation cannot trump a defendant's right to a fair trial, so it is not for the prosecution to decide how much cross-examination of its main witnesses is enough, or on what subjects. The Court should therefore grant the requested writ of certiorari. The convictions must be reversed, and a new trial with full disclosure of the witnesses' prior statements allowed.

2. The decision of the court below upholding the trial court's refusal to allow cross-examination of a key government witness about the witness's admission to having committed an unprosecuted double murder flouts this Court's precedent under the Confrontation Clause allowing a defendant to show bias.

The Court should also grant certiorari to review the decision of the court below failing to recognize that the trial court abused its discretion under Fed.R.Evid. 611(b) and erred under the Confrontation Clause of the Sixth Amendment in refusing to permit impeachment of prosecution witness (and indicted, alleged co-conspirator) Bessinger with his admission to having committed homicide in furtherance of his prior drug trafficking activity. The court below acknowledged that the proper scope of cross-examination naturally includes "matters affecting the credibility of the witness," Appx. B26 (quoting Rule 611(b)), and that exposure to criminal charges can create significant bias of a witness in favor of the government. Id., citing Davis v. Alaska, 415 U.S. 308

(1974)[7]; see also, e.g., Delaware v. Van Arsdall, 475 U.S. 673 (1986). A jury might reasonably think such bias would affect credibility rather powerfully.

The court of appeals upheld the district court's restriction on cross-examination:

> The alleged murders Bessinger now denies occurred almost twenty years ago in relation to a drug transaction on the high seas. Defendants contend this evidence shows bias because the alleged murders may have motivated Bessinger to align with the government in order to avoid prosecution. But Bessinger now asserts he did not murder anyone and the alleged murder was merely a rumor he started in order to explain a drug seizure. The government asserted that to allow cross-examination of Bessinger about an unrelated alleged murder that occurred almost twenty years ago, for which there has never even been a suggestion of prosecution, would only have served to confuse the jury. We agree. While credibility was important to this trial, the denial of cross-examination on such a tangential topic did not constitute either a breach of Fed. R. Evid. 611(b) or the Sixth Amendment.

App. A16-17.

In this case, since the proposed impeachment did not rest upon Fed.R.Evid. 609, it is immaterial that Bessinger was never convicted of these murders, which was the district court's initial focus, CA3 J.A. 143, and to

[7] In its post-trial opinion, the district court declined to revisit the issue of its restriction on cross-examination of Bessinger. See Appx. B29 n.7.

which the court below also alluded.[8] The point is that he could have been charged for them, based on his own self-incriminating admissions and some corroboration, under 18 U.S.C. § 1962 (RICO, including both drug dealing and murder as predicates) or under id. §§ 1111(b) and 7 (murder by American on the high seas), without concern for any statute of limitations, see id. § 3281; or at least he might have feared being so charged.[9] He could also have faced a sentencing enhancement of up to life imprisonment for such conduct in this very case. See 21 U.S.C. §§ 841(b), 960(b) (drug offenses resulting in death); USSG § 5K2.1 (p.s.) (upward departure authorized); USSG § 4A1.3 (p.s.) (understatement of criminal history).

The prosecutor's suggestion, CA3 J.A. 252, echoed by the court below, Appx. A16-17, that no motive to favor the government existed because Bessinger denied having actually committed the murders (although he admitted having stated that he had committed them) is incomprehensible. On that view, the witness at least is admitting that he has been willing to lie about a very serious matter in order to advance his interests in the drug business. Moreover, even an innocent person who has confessed to a double murder has good reason to fear

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[8] While the court below did not directly rely on the lack of any conviction, it also fails to say how removing this factor from those actually considered by the trial court would allow an affirmance of the trial judge's discretionary decision.

[9] Similarly, bias might arise from the witness's desire to curry favor with American authorities to protect himself from extradition to Colombia to face murder charges, as the victims were said to be Colombian nationals.

being charged; indeed, the case books are full of examples of convicted murderers (some innocent, some no doubt guilty) who later disavowed their confessions. At best, the prosecutor's arguments against allowing the cross-examination on this subject, like those of the court below, went to weight and not admissibility. The prohibited line of cross should have been allowed.

The rulings of the courts below cannot be reconciled with this Court's decisions on the right of confrontation and cross-examination. In Olden v. Kentucky, 488 U.S. 227 (1988) (per curiam), the Court summarily and unanimously[10] reversed a conviction where the defense had been barred from an inflammatory but critical line of impeachment for bias. In Olden, as in this case, the prohibited cross sought to bring before the jury the defendant's theory of why the principal prosecution witness had a motive to lie. The Court in Olden reaffirmed that a denial of full cross-examination can be, and there was, a violation of the Confrontation Clause.[11] The Court noted that in its earlier decision in Davis v. Alaska, 415 U.S. 308 (1974):

> We observed that, subject to 'the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation ..., the cross-examiner has traditionally been allowed to

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[10] Justice Marshall dissented solely on the basis that it was his practice to object to all summary dispositions of cases on the basis of the certiorari papers alone.

[11] In that case, arising out of a state court criminal trial, the Confrontation Clause applied through the operation of the Due Process Clause of the Fourteenth Amendment. Here, as in all federal criminal cases, it applies directly.

> impeach, i.e., discredit, the witness.' [Davis], at 316 .... We emphasized that 'the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. Id., at 316-17 .... Recently, in Delaware v. Van Arsdall, 475 U.S. 673 ... (1986), we reaffirmed Davis, and held that 'a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness."' 475 U.S. at 680 ..., quoting Davis, supra, at 318 ....

488 U.S. at 231. Potentially devastating cross-examination to this end was unreasonably and unconstitutionally restricted in petitioners' case.

Similarly, in Delaware v. Van Arsdall this Court unanimously found Confrontation Clause error in a restriction on cross-examination, where the defense was not permitted to cross-examine a critical witness for bias arising out of his own problems with the police. The Court then remanded for a determination of prejudice. As the Court explained:

> Whether such an error is harmless in a particular case depends upon a host of factors .... These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contra-

dicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

475 U.S. at 684, quoted in Olden, 488 U.S. at 233 (finding "it impossible to conclude 'beyond a reasonable doubt' that the restriction of petitioner's right to confrontation was harmless." Id.).

In its ultimate conclusion that the "jury was appropriately informed about any potential bias," Appx. A17, the court below appeared to labor under a misapprehension of the record. Cooperating witness Bessinger had not "entered [into] a plea bargain with the government in which he was to serve a twenty year minimum jail sentence" even though he was already "sixty years old at the time of this agreement." Id. Perhaps the jury was confused (as apparently was the panel) into thinking so. But Bessinger's agreement merely exposed him to that sentence, making it mandatory unless he pleased the prosecutors sufficiently to generate a motion under 18 U.S.C. § 3553(e) allowing a departure below that minimum. Gov't CA3 Supp. App. 54-55a; see also Gov't Exh. 20 (plea agreement); cf. Melendez v. United States, 518 U.S. 120 (1996) (discussing prosecutorial motions under § 3553(e)). Thus, far from tending to eliminate concerns about further bias arising from the murder-confession evidence, Bessinger's plea agreement proves how powerful was his incentive to cooperate, and how questionable his credibility. This further evidence of bias could well have tipped the balance of reasonable doubt with the jury.

For these reasons, this Court should grant the writ of certiorari to consider whether the trial court violated

the petitioners' right of confrontation and cross-examination when it barred them from asking a key government witness about the witness's admission to having committed an unprosecuted double murder.

3. The courts below misapplied this Court's controlling standard for "custody" under Miranda v. Arizona, 384 U.S. 436 (1966), and deviated from other Circuits' rulings, when they determined that petitioner Massanova was not entitled to warnings before being interrogated at his kitchen table for up to two hours by armed agents.

The decision of the court below upholding the district court's partial denial of petitioner Massanova's Miranda motion conflicts with the decisions of other Circuits and seriously misapplies this Court's controlling precedent. Accordingly, the writ of certiorari should be granted on this question as well.

A critical statement made by petitioner Massanova to FBI agents was used at trial against him.[12] At the time

[12] The statement was never quoted, only characterized. As described in the agents' Form 302 interview report of the June 14, 1996, interrogation (dictated 6/21/96), the statement came from this: "MASSANOVA and the interviewing agents discussed MASSANOVA cooperating in the continuing investigation. The interviewing agents, together with MASSANOVA and his wife discussed this matter for approximately an hour. Throughout this period MASSANOVA was very reluctant to cooperate, stating that for him to do so he would have to implicate close life long friends." Id. at 1. As revised by the prosecutor in a pre-trial disclosure letter, the statement was, "The agents told Fred Massanova they had a search warrant and that they were investigating him for his involvement with marijuana. They asked him to cooperate.

he made the statement, petitioner was seated at his kitchen table between 6 a.m. and 8 a.m., being "interviewed" by two agents who had told him they had a search warrant for his house, that a "team" of other agents (Mr. Massanova testified that the word the agents used was "army," not "team") was waiting outside to assist in executing the warrant, and that he should "cooperate" with them because he was facing twenty years in prison. During the two hours they spoke in the kitchen, Mr. Massanova never left the agents' sight. Mr. Massanova had not been warned of his rights before making the statement, which was indisputably given in response to "interrogation." Yet the court below upheld the district court's determination that Mr. Massanova was not "in custody" at that time -- a prerequisite for application of the principles of Miranda v. Arizona, 384 U.S. 436 (1966). Appx. A7. Under controlling precedent, however, that conclusion was erroneous.

The key to the "custody" determination is not whether the suspect has technically been arrested, but whether the authorities have imposed a "'restraint on freedom of movement' of the degree associated with a formal arrest." California v. Beheler, 463 U.S. 1121, 1125 (1983), quoting Oregon v. Mathiason, 429 U.S. 492, 495

_____(cont'd)

He asked them what he would have to do if he cooperated. He was told his cooperation would possibly include testifying at trial and making consensual recordings. He said to cooperate he would have to give up close life long friends." CA3 J.A. 253. As redacted by the trial judge and heard by the jury, it read, "He said he was reluctant to do so [that is, cooperate with the agents' investigation], because if he did, he would have to provide information about some friends." CA3 J.A. 389-90.

(1977) (per curiam). The court of appeals held in this case that nothing qualified to put petitioner into a "custody" status until the agents trailed him upstairs and refused to allow him to close the door when he showered. App. A8. The court below suggested that "there was no agent conduct or language that suggests limited freedom before that point and thus any statements Massanova made in the kitchen were admissible." App. A8. That the agents allowed Mr. Massanova limited freedom to speak privately with his wife a couple of times, App. A7 -- although never out of their sight -- simply shows that he was not (yet) in a police holding cell.

After all, even in a prison visiting room he would have freedom to speak with his wife, and the police might have allowed such conversations to occur even after formally arresting him in his home (which concededly did not occur). The constitutional test fully contemplates that in a given case there may be facts pointing both ways; as this Court says, it is a matter of "degree." Beheler, 429 U.S. at 495. Under that test, however, the court must find "custody" if the agents even "indicate" that the suspect is at least "deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 444 (emphasis added).

In this case, the display of the search warrant by the visibly armed agents, the statement that other agents were waiting outside, and the threat as to the severity of the penalty petitioner Massanova was facing, together plainly "indicate[d]" -- to put it mildly -- that the agents would neither have simply left his house had he asked them to nor allowed him to depart the premises on request. The search warrant alone authorized the agents to detain petitioner in his home, as they surely knew. See

Michigan v. Summers, 452 U.S. 692 (1981). A reasonable person would think under those circumstances that arrest was inevitable, even if not yet formally effectuated; the government has never contended that Mr. Massanova was told he was not under arrest or that he was free to leave.

The Circuits are not of one mind on application of Miranda in like circumstances. Decisions of other circuits are in contrast with that of the court below in this case. See, e.g., Sprosty v. Buchler, 79 F.3d 635, 640-43 (7th Cir. 1996) (defendant "in custody" at home during execution of search warrant, where he was guarded for 3 hours); United States v. Griffin, 922 F.2d 1343 (8th Cir. 1990) (defendant "in custody" at home when he arrived home to find police already inside by invitation of another, and police "took control of the scene"); United States v. Longbehn, 850 F.2d 450, 452-53 (8th Cir. 1988) (defendant "in custody" at home when taken there by police, and 5 officers searched while 3 questioned him). Thus, in other circuits the protections of Miranda might well have been found to apply.

The court of appeals' determination that no "indicat[ion]" of custody existed until the agents refused to allow petitioner to close his bathroom door, App. A8, blinks reality and cannot be squared with precedent. It defies experience and common sense to think that either the agents' professional behavior, insofar as it manifested control over the situation and over his movements, or petitioner's reasonable perception of that behavior, changed so dramatically when he asked to go upstairs and dress that only then did "custody" begin. An objective assessment of the situation would not lead a reasonable person in Mr. Massanova's position to think

that a simple request would have produced permission to leave the premises. See Thompson v. Keohane, 516 U.S. 99, 112 (1995). Even before being trailed upstairs by the agents, Mr. Massanova obviously "was not free to go where he pleased." Orozco v. Texas, 394 U.S. 324, 325 (1969).

Public policy dictates that the test for "custody" be liberally construed, so as to encourage compliance with Miranda's simple, well-known rules and avoid protracted court battles over voluntariness. See generally Dickerson v. United States, 530 U.S. 428 (2000). For these reasons, the Court should grant this petition for a writ of certiorari to address the Miranda custody issue as well.

CONCLUSION

For the foregoing reasons, petitioners FRED MASSANOVA and STEVEN IMMENDORF pray that this Court grant their petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit affirming their convictions.

Respectfully submitted,

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May 4, 2001

APPENDIX A

UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 99-1876 & 99-1892

UNITED STATES OF AMERICA

v.

FRED MASSANOVA,
Appellant at No. 99-1876

STEVEN IMMENDORF,
Appellant at No. 99-1892

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Criminal Nos. 98-cr-00631-1 & 98-cr-00631-2
(Honorable Harvey Bartle, III)

Argued September 21, 2000
Before: SLOVITER, SCIRICA and FUENTES,
Circuit Judges
(Filed October 25, 2000)

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MEMORANDUM OPINION

SCIRICA, Circuit Judge.

Appellants Fred Massanova and Steven Immendorf have appealed their criminal convictions and sentences on several grounds. They have asked for a new trial contending the District Court erred in its suppression, severance and discovery rulings, as well as its rulings relating to the examination of witnesses. In addition, they assert the District Court failed to adequately instruct the jury about inappropriate remarks made by the prosecution during closing arguments. Finally, defendants contend the District Court made errors in its factual findings during sentencing.

Having reviewed the several arguments, we will affirm.

I. Background

From 1994-1996 appellants Fred Massanova and Steven Immendorf were involved in trafficking large quantities of marijuana in the Philadelphia area. Massanova and Immendorf obtained their supplies from

Clifton Cato, who in turn received the marijuana from contacts in Arizona. Massanova and Immendorf's drug operation involved sending couriers to Arizona who transported the marijuana to Immendorf and Massanova in Philadelphia.[1] Immendorf stored some of the marijuana in a secret compartment in his home basement on Longspur Street in Philadelphia.

On the morning of June 14, 1996 at approximately 6:00 A.M., FBI Agents Charles Murray and Sidney Perry conducted a search of Massanova's home on Shunk Street, Philadelphia. The agents spoke to Massanova in his kitchen for approximately one hour. During this time Agent Perry asked Massanova to cooperate with the marijuana investigation. Massanova responded that he was reluctant to do so, because if he did, he would have to provide information about certain close, lifelong friends.[2]

In December 1998 a grand jury returned a three-count indictment charging Massanova and Immendorf with conspiracy to distribute marijuana in violation of 21 U.S.C. §846. The indictment also charged Immendorf with maintaining a marijuana storage facility in violation

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[1] One of the couriers in this operation was Richard Bessinger. Bessinger was one of the government's principle [sic] witnesses against Massanova and Immendorf.

[2] In admitting this statement at trial, the District Court redacted the words "close, life-long" in order to avoid any prejudice to Immendorf. Immendorf was Massanova's cousin and argued that the words "life long" would lead the jury to improperly implicate him with this statement.

of 21 U.S.C. §856(a)(2), and possession with intent to distribute marijuana in violation of 21 U.S.C. §841(a)(1).

Before trial, Massanova moved to suppress statements he made to Agents Murray and Perry on June 14, 1996. The District Court denied the motion to suppress holding Massanova was not in custody during his conversation with the agents in his kitchen. See Miranda v. Arizona, 483 U.S. 436 (1966). As a result of this ruling, Immendorf renewed his motion for severance arguing Massanova's statements improperly implicated him in the crime. The District Court denied the motion for severance holding the statements, as redacted, would not improperly implicate Immendorf.

Before trial, defendants made several discovery requests including requests for disclosure of certain grand jury testimony and DEA investigative reports. Defendants also requested the rough notes of Agents Perry and Murray's conversation with Massanova. The government refused to turn over these rough notes. The government also redacted portions of the requested investigative reports and grand jury testimony arguing some of the information contained in these items was part of on-going criminal investigations. Defendants asked the District Court for complete copies of these reports. The District Court conducted an *in camera* review of the government redactions and declared them to be appropriate. Defendants contest this ruling.

At trial, both Clifton Cato and Richard Bessinger testified for the prosecution on Massanova's and Immendorf's role in the drug operation. Massanova and Immendorf were found guilty on all charges. As noted, the District Court denied their motion for a new trial.

Massanova and Immendorf were sentenced to 151 months and 97 months imprisonment respectively. Defendants argue the District Court made factual errors at sentencing, specifically, misapplication of the relevant conduct, role in the offense, duration of conspiracy, and acceptance of responsibility provisions of the U.S. Sentencing Guidelines. Both defendants have appealed.

II. Admission of Massanova's Kitchen Statements

The first group of issues surround Massanova's statements to Special Agent Sidney Perry during the execution of the FBI's search warrant on June 14, 1996. After Massanova was awoken by Special Agents Perry and Murray, he was told a team of FBI agents were going to search the house. Massanova accompanied Perry and Murray into his kitchen where they talked for more than one hour. As more agents arrived to conduct the search, Massanova agreed to go to a local hotel to continue his conversation with Perry and Murray. Massanova asked if he could take a shower. The agents consented, but only after searching his bedroom and bathroom. The agents also required Massanova to keep the bathroom door open so he would remain in their sight.

Massanova sought to suppress all the statements made to the agents in his kitchen on the basis that he had not been given Miranda warnings before interrogation. The District Court denied his motion to suppress holding Massanova was not in custody when he was questioned in his kitchen. The District Court stated:

> Although it is a close case, a reasonable person would not have understood at that point, during the conversation in Massanova's kitchen, that he was under arrest. Massanova was not "deprived of his freedom of action in any significant way"

while the agents questioned him in the kitchen. Miranda, 384 U.S. at 444. In fact, at one point he left the kitchen to call to his wife who was upstairs. We conclude that Massanova was not in custody during the conversation that took place in his kitchen. Therefore, any statements he made at that time were not inadmissible due to the failure of the agents to give him Miranda warnings. United States v. Massanova, No. CRIM. A. 98-631-02, 1999 WL 761136, *6 (E.D. Pa. Sept. 21, 1999).

Massanova contends the statements violated his Fifth Amendment right against compulsory self-incrimination. He also argues their admission violated Fed. R. Crim. P. 12(b)(2) and 16(a)(1)[3] since the government failed to adequately disclose the substance of these statements during discovery. He contends the District

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[3] Rule 16(a)(1)(A) states:

> Upon request of a defendant the government must disclose ... and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government .... The government must also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial ....

Court abused its discretion by admitting the statements under Fed. R. Evid. 403 and 802.

Our standard of review differs for each issue. We exercise plenary review over the District Court's finding whether the agents conducted a custodial interrogation. United States v. Leese, 176 F.3d 740, 743 (3d Cir.) cert. denied,120 S.Ct. 267 (1999). Rulings on discovery violations and the admission of evidence are reviewed for abuse of discretion. United States v. Hernandez, 176 F.3d 719, 726 (3d Cir. 1999).

A. Miranda Violation

In this case, the central issue is whether Massanova was in custody when he was questioned by the FBI agents and entitled to receive Miranda warnings. The Supreme Court has held a defendant can be in custody and be in his own home; he does not need to be formally arrested. See Orzoco v. Texas, 394 U.S. 324 (1969). Custody begins when the defendant has been "deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 444. Here, several factors support the District Court's finding that Massanova was not in custody until he requested to take a shower and the agents required him to leave the bathroom door open so they could observe him.

During the kitchen conversation the agents did not tell Massanova he was under arrest. Massanova was permitted to talk to his wife privately on two or three occasions. He called to her when he heard her stirring upstairs and met her at the bottom of the stairs when she came down. Massanova's freedom of movement does not support the finding that a reasonable person would have thought he was in custody or under arrest.

As Massanova has noted, the key to any "custody" determination is whether "something" was "said or done by the authorities, either in their manner of approach in the tone or extent of their questioning, which indicated they would not have heeded a request to depart or to allow the suspect to do so." Leese, 176 F.3d at 743. That "something" in this case occurred when the agents followed Massanova up to his bedroom, searched the bathroom and required him to keep the door open during his shower. But there was no agent conduct or language that suggests limited freedom before that point and thus any statements Massanova made in the kitchen were admissible. The District Court's conclusion was proper.

B. Rule 16 Discovery Requests

Massanova argues the District Court abused its discretion under Fed. R. Crim. P. 16(d)(2)[4] in admitting the "kitchen statements" at trial in a materially different version than the government disclosed to him under Rule16(a)(1)(A). This issue concerns a memorandum written by Agent Perry on June 21, 1996 which stated:

> Prior to initiating the searches, MASSANOVA and the interviewing agents discussed MASSANOVA cooperating in the continuing investigation. The interviewing agents, together with MASSANOVA and his wife discussed this

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[4] Rule 16(d)(2) states:

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may ... prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

> matter for approximately an hour. Throughout this period MASSANOVA was very reluctant to cooperate, stating that for him to do so he would have to implicate close life long friends. At the conclusion of this discussion, MASSANOVA stated that he was willing to cooperate, but also reserved the right to discontinue his cooperation at any time.

On the day the trial began, the prosecution disclosed Agent Perry would testify to the following:

> The agents told Fred Massanova they had a search warrant and that they were investigating him for his involvement with marijuana. They asked him to cooperate. He asked them what he would have to do if he cooperated. He was told his cooperation would possibly include testifying at trial and making consensual recordings. He said to cooperate he would have to give up close life long friends. He said he would cooperate but he wanted to be able to stop cooperating at any time.[5]

Massanova asserts the District Court abused its discretion by allowing Agent Perry to testify under Fed. R. Crim. P. 16(d)(2) because the proposed testimony was materially different from the version of events disclosed in the previous memorandum.

There is no dispute Massanova sought and was entitled to receive pre-trial discovery of all statements he made which the prosecution had in its possession. See Fed. R. Crim. P. 16(a)(1)(A). Although this does not

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[5] Letter to counsel, April 27, 1999 from AUSA Keever.

require the prosecution to provide a verbatim transcript of statements, Massanova was entitled to know the "substance" of such statements. See United States v. Holloway, 740 F.2d 1373, 1381 (6th Cir.) cert denied, 469 U.S. 1021 (1984). The issue therefore is whether Agent Perry's initial memorandum disclosed the "substance" of the Massanova's statements before trial and whether Agent's Perry's proposed evidence was materially different.

We hold the substance of the defendant's statements was appropriately disclosed. Massanova argues Agent Perry's initial memorandum might have related to past rather than current marijuana activities and this difference may have materially affected trial preparation. But it is clear from the report that the "continuing investigation" involved the current marijuana investigation and the "substance" of the defendant's statements was disclosed well in advance of trial. The District Court did not abuse its discretion by failing to grant any sanction or remedy under Rule 16(d).

C. Fed. R. Evid. 403 and 802.

Massanova argues his statements to Agents Perry and Murray are inadmissible under Fed. R. Evid. 403 and 802.[6] The District Court found Massanova's argument meritless. See Massanova, 1999 WL 761136, at * 7.

Massanova asserts Rule 403 applies because, in order to pursue a claim of innocence for the conspiracy charge, he would need to confess his involvement in

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[6] Fed. R. Evid. 403 excludes evidence when its probative value is substantially outweighed by the danger of unfair prejudice. Fed. R. Evid. 802 excludes hearsay evidence.

other unrelated marijuana transactions which would otherwise be inadmissible under Fed. R. Evid. 404(b). This ambiguity, according to Massanova, meant his "kitchen statements" were unfairly prejudicial and should not have been admitted.

The District Court did not abuse its discretion by admitting the kitchen statements under Fed. R. Evid. 403. The evidence suggests the agents spoke with Massanova in the kitchen about his marijuana involvement in "this investigation" for more than one hour. Furthermore, Agent Perry's June 21, 1996 memorandum stated this conversation concerned the "continuing investigation." A fair and reasonable inference from these facts is that Massanova knew the conversation was about his current marijuana involvement. While rebutting this inference may have involved raising Massanova's prior involvement with marijuana and thereby raising considerations of prejudices, we do not find the admission of his kitchen statements an abuse of discretion. This is unlike United States v. Schwartz where the relevance of prior cocaine transactions was marginal and the prejudice great. See 790 F.2d 1059 (3d Cir. 1986). Here, the kitchen statement was inculpatory and relevant. The District Court did not abuse its discretion by admitting the statements.

Finally, Massanova alleges Agent Perry's trial testimony that his cooperation was sought in connection with his "involvement with marijuana" was hearsay and inadmissable under Fed. R. Evid. 803. Agent Perry's statement was necessary to put Massanova's statements into context. See United States v. Sorrentino, 72 F.3d 294, 298 (2d Cir. 1995). Furthermore, the statements were neither unduly prejudicial nor hearsay. The District Court did not abuse its discretion.

III. Appellant Immendorf's Motion for Severance

Because Massanova's statements were not barred, Immendorf argues the District Court should have granted his motion for severance. See Bruton v. United States, 391 U.S. 123 (1968) (the introduction of a co-defendant's confession can pose a substantial threat to the defendant's right to confront the witnesses against him, necessitating severance). Immendorf contends Massanova's statement that he was reluctant to cooperate "because, if he did, he would have to provide information about some friends" posed a similar substantial threat to Immendorf.

The two relevant cases are Richardson v. Marsh, 481 U.S. 200 (1987) and Gray v. Maryland, 523 U.S. 185 (1998). In Gray, the Supreme Court held severance was necessary when the lower court merely deleted the co-defendant's name and replaced it with the word "delete" in a statement implicating him in the offense charged. See 523 U.S. 185. The Supreme Court found this type of redaction did not significantly reduce or eliminate the offending prejudice and the inference was still obvious and immediate. See id. In contrast, in Richardson, severance was unnecessary when the relevant confession was redacted to omit all references to the co-defendant and thus the relevant statement was only incriminating when linked with evidence later introduced at trial. See 481 U.S. at 208.

We see no error. As noted by the District Court, joint trials generally serve the interests of justice by avoiding inconsistent verdicts and promoting judicial efficiency. See Zafino [sic] v. United States, 506 U.S. 534, 537 (1993). Here, it was not immediately obvious Immendorf was one of the persons being referred to by

Massanova. Although subsequent evidence pointed out the defendants were cousins, that fact alone did not necessarily justify severance. In Richardson the Court asserted

> with regard to an inferential incrimination[,] the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget. In short, while it may not always be simple for the members of a jury to obey the instruction that they disregard an incriminating inference, there does not exist the overwhelming probability of their inability to do so that is the foundation of Bruton's exception to the general rule. 481 U.S. at 208.

Here, there was no overwhelming probability the jury would connect Massanova's statement to Immendorf, or that instructions would not have overcome any possible inference. The District Court Judge expressly asked Immendorf's counsel if he wanted a cautionary instruction to be issued after Massanova's statement was admitted,[7] and he declined.[8]

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[7] The District Court Judge asked, "Mr. Shuman, do you want me to give a cautionary instruction to the jury that any statements that Agent Murray referred to that were made by Fred Massanova can only be used in connection with the case against Fred Massanova and may not be used in the case against Steven Immendorf?" See App. 400a-401a.

[8] Counsel for Immendorf stated, "I'm certainly conceding that your Honor has indicated to me that you're willing to give that instruction and I have said for reasons that I

IV. Discovery Rulings

Both Massanova and Immendorf argue the District Court erred by allowing the government to redact certain portions of investigative reports and grand jury testimony and by refusing to order the disclosure of the investigating FBI agents' rough notes. These complaints relate to three documents: the DEA 6 report of Jan 13, 1999, the debriefing of government witness Clifton Cato, and Cato's grand jury testimony.

The District Court conducted an *in camera* review of the redacted material under Fed. R. Crim. P. 26(2) [sic] and concluded the material was not relevant to the conspiracy at issue. In the interests of keeping the government's ongoing investigation confidential, the court ruled the evidence should not be admitted.

We have reviewed the unmarked material and confirm the redacted material is not directly relevant to Massanova's and Immendorf's role in the conspiracy. As the United States Supreme Court stated in Brady v. Maryland, only relevant material must be disclosed. See 373 U.S. 83 (1963). Since the material does not relate to Massanova and Immendorf's involvement in the conspiracy, the District Court did not abuse its discretion by failing to admit the evidence.

We also reject defendants argument that Agents Perry and Murray's "rough notes" should have been disclosed. See Fed. R. Crim. P. 26(2)(f)(1). Agents' rough notes do not constitute "statements" unless the agents took some action, such as signing the draft, to show adoption. See United States v. Ramos, 27 F.3d 65,

_____(footnote continued)

have stated that I don't think it's in the defendant's best interest." See id. at 402.

69-70 (2d Cir. 1994); United States v. Ammar, 714 F.2d 238, 259 (3d Cir. 1983). The agents did not adopt the statements here and thus Fed. R. Crim. P. 26 (2)(f)(1) and 18 U.S.C. §3500(e)(1) do not apply. There is no evidence to suggest the rough notes contained Brady material. We see no abuse of discretion.

V. Trial Rulings

Defendants contend the District Court should have permitted reexamination of certain government witnesses. They allege the District Court instituted a blanket rule against re-cross examination that resulted in violations of their Sixth Amendment confrontation rights. The first related to testimony by Clifton Cato under redirect where he stated he learned about the search of Massanova's home from a mutual friend. Defendants maintain the existence of this mutual friend was new evidence and they were entitled to re-cross Cato. Defendants also allege they should have been able to re-cross Cato about a vehicle he purchased from Richard Bessinger since it was also new information revealed under re-direct. The third piece of alleged new information was Bessinger's testimony that Massanova was still dealing drugs toward the end of 1995. Lastly, defendants allege Special Agent Kepner's testimony on re-direct concerning Steven Immendorf's pager number was new evidence.

The privilege of re-cross examination lies within the trial court's sound discretion. See United States v. Stoehr, 196 F.2d 276 (3d Cir. 1952). If a new subject is raised in direct examination then the District Court should permit re-cross examination. See id.

Even though the District Court appeared to impose a blanket rule disallowing re-cross examination, we are

not convinced the material elicited on re-direct was sufficiently new to invoke a requirement for reexamination.[9] Furthermore, it would not have affected the outcome of the case. The testimony defendants allege was new was only peripherally relevant and the evidence against the defendants was strong. Any error therefore was harmless.

A. Cross Examination of Richard Bessinger

The District Court did not permit defense counsel to question Richard Bessinger on his self admitted murder of two men in a prior drug transaction. Defendants contend this ruling violated the Confrontation Clause and Fed. R. Evid. 611(b).

The Sixth Amendment guarantees criminal defendants the right to confront witnesses. See Davis v. Alaska, 415 U.S. 305, 315 (1974). Fed. R. Evid. 611(b) limits the scope of cross-examination "to the subject matter of the direct examination and matters affecting the credibility of witnesses." The District Court retains wide discretion over the scope of cross-examination. See United States v. Casons, 950 F.2d 893, 918 (3d Cir. 1991).

The alleged murders Bessinger now denies occurred almost twenty years ago in relation to a drug transaction on the high seas. Defendants contend this evidence shows bias because the alleged murders may have motivated Bessinger to align with the government in order to avoid prosecution. But Bessinger now asserts he did not murder anyone and the alleged murder was

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[9] Blanket prohibitions against re-cross examination when new material is raised can violate the Sixth Amendment[.] See [United States v.] Riggi, 951 F.2d 1368, 1375 (3d Cir. 1991).

merely a rumor he started in order to explain a drug seizure. The government asserted that to allow cross-examination of Bessinger about an unrelated alleged murder that occurred almost twenty years ago, for which there has never even been a suggestion of prosecution, would only have served to confuse the jury. We agree. While credibility was important to this trial, the denial of cross examination on such a tangential topic did not constitute either a breach of Fed. R. Evid. 611(b) or the Sixth Amendment. See Casons, 950 F.2d at 918. Furthermore, the jury was informed that Bessinger had entered a plea bargain with the government in which he was to serve a twenty year minimum jail sentence and that he was sixty years old at the time of this agreement. The jury was appropriately informed about any potential bias. The District Court did not abuse its discretion.

B. Prosecutor's Closing Statements

Massanova and Immendorf request a new trial contending the prosecution improperly vouched for the government's witnesses during closing arguments and the District Court's jury instructions did not properly cure the prejudice. In closing argument the prosecution stated:

> Well, the defense had to regroup. We better think of plan C; let's attack the Government, let's make the Government look like there is this hidden conspiracy. The U.S. Attorney's Office, the DEA, the fingerprints, we're all involved. And not only the Government, Clifton Cato and his attorney is involved in this conspiracy and Richard Bessinger and his attorney is involved in this conspiracy. And we all got together and we created a bunch of lies against Massanova and Immendorf because we want to convict two innocent men.

That's what you have to believe to believe the defense theory. Don't be fooled, ladies and gentleman, that attempt by the defense to make you think that this is a Government conspiracy. That there is a hidden deal here to let Clifton Cato out of jail, to get Richard Bessinger a probation sentence and to put these men in jail instead, because we don't like them, but we like Clifton Cato and we like Richard Bessinger, we the Government chose to let these defendants go because we want them.

Defense counsel's objection was sustained and the trial judge gave a curative instruction to the jury.[10] The District Court also gave a second curative instruction before charging the jury.[11] Defendants allege the

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[10] The judge's instruction was:

> Members of the jury, I just want to tell you that the lawyers are not allowed to what we call vouch for witnesses. In other words, they can't tell you whether they believe a witness or they don't believe a witness. That's a matter for you to decide. And to the extent any of the attorney's in the closings said that they believe a witness, you should totally disregard that, because it's not their job to -- their job is to present the evidence and to argue about it, but not to say whether they believe it or they don't believe it. That's for you to decide, without any help from them on that particular issue. J.A. 523-24.

[11] In the second instruction, the Judge stated:

> Before I give you your instruction, I just want to make one further clarification. The prosecutor and the defense attorneys are only permitted to argue guilt or innocence of the defendants based on the

curative instructions were insufficient because they inappropriately referred to both the government and defense counsel when it was only the government who made the inappropriate comments. We review a District Court's decision not to grant a mistrial on the ground that the prosecutor made improper remarks in closing argument for abuse of discretion. United States v. Molina-Guevara, 96 F.3d 698, 702 (3d Cir. 1996).

Although finding improper vouching, the District Court held a new trial was unnecessary because the statements were harmless. We agree. See United States v. Mastrangelo, 172 F.3d 288, 297 (3d Cir. 1999) (in assessing whether an error was harmless, we look "to the scope of the improper comments in the overall trial context, the effect of any curative instructions given, and the strength of the evidence against the defendant"); United States v. Zehrback [sic], 47 F.3d 1252, 1265 (3d Cir.) [(en banc)], cert. denied, 514 U.S. 1067 (1995) (an error is considered harmless when "it is highly probable that the error did not contribute to the judgment"). In this case, the District Court's two curative instructions sufficiently addressed the prosecutor's improper statements. As we held, the evidence against the defendants was strong and any prejudice was cured. We see no abuse of discretion.

_____(footnote continued)

> evidence that was [ad]duced at the trial and nothing else. The personal opinions of lawyers is [sic] not relevant and must be disregarded. Whether or not the Government and others conspired to prosecute innocent persons is not the issue[,] and that is not a matter for you to take into consideration. Again, your decision must be based solely on the evidence in the case and nothing else. J.A. 525.

VI. Sentencing

Defendants contend the District Court made factual errors in their sentences. We review the factual findings of the sentencing court under the clearly erroneous standard. See United States v. Gibbs, 190 F.3d 188, 203 (3d Cir. 1999).

A. Drug Quantity Calculation

Defendants contend the District Court improperly calculated the quantity of drugs attributable to them at 2,000 pounds instead of 1,200 pounds, arguing its judgment was based solely on the unreliable trial testimony of Calvin [sic] Cato. Defendants cite United States v. Miele, which held the uncorroborated and inconsistent testimony of a single addict witness was insufficient to establish the quantity of drugs. See 989 F.2d 659, 663-64 (3d Cir. 1993). In Miele, the addict witness gave varying estimates of the amount of drugs involved, and the court determined he was not a credible witness. See id.

In contrast, the District Court here found Calvin [sic] Cato to be credible. The trial judge stated:

> After reviewing the evidence and listening to argument ... [I find] that the amount of marijuana attributable to ... [Massanova and Immendorf] is 2000 pounds. I find that that is the most credible of the numbers; in fact the only credible number, and I look at the report of the investigation. ... which states early on, ... Mr. Cato indicated ... [they] received 2,000 pounds of marijuana during the course of the conspiracy. So I find that that is the correct number, the credible number, and it has sufficient indicia of reliability for me to accept it.

Additionally, there was physical evidence corroborating Cato's testimony. The government introduced telephone, toll, and credit card records supporting Cato's testimony. They also produced drug paraphernalia found in the secret compartment of Immendorf's home. All of these items corroborate Cato's testimony. Since Cato's statements in the DEA's investigative report have an appropriate indicia of credibility, the District Court's judgment was not clearly erroneous. See United States v. Webster, 54 F.3d 1, 5 (1st Cir. 1995).

B. U.S.S.G. § 3B1.1(c)

Massanova contends the District Court improperly added two levels to his sentence determination as "organizer, manager or leader" of Immendorf's criminal activity. He argues the District Court's factual determination failed to pinpoint his supervisory role.

To qualify under U.S.S.G. § 3B1.1(c) a defendant "must have exercised some degree of control over others involved in the commission of the offense." United States v. Phillips, 959 F.2d 1187, 1191 (3d Cir.), cert. denied, 506 U.S. 987 (1992). These factors include whether the defendant "exercise[d] ... decision making authority, the nature of participation in the commission of the offense ... the degree of participation in the planning and organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others." United States v. Ortiz, 878 F.2d 125, 127 (3d Cir. 1989).

The District Court here relied on both Calvin [sic] Cato and Richard Bessinger's trial testimony in finding Massanova supervised Immendorf. We cannot say this was clearly erroneous.

C. U.S.S.G. § 4A1.1(D)

Massanova contends the District Court erred in finding he was involved in the drug conspiracy until June 1996; therefore, his criminal history points were miscalculated under U.S.S.G. § 4A1.1(D).[12] The District Court's finding was based largely on Calvin [sic] Cato's testimony. We defer to findings based on the credibility assessment of witnesses. See United States v. Webster, 54 F.3d at 5. Because the District Court's decision was based on facts and testimony that had more than a minimal "indicium, of reliability to support its probable accuracy," the finding was not clearly erroneous. See Miele, 989 F.2d at 663. We will affirm.

D. U.S.S.G. § 3E1.1

Immendorf argues he should have received a two level reduction in his offense level under U.S.S.G. § 3E1.1 for acceptance of responsibility. Immendorf contends that before trial he negotiated with the government for a proposed sentence stipulation agreement. In the proposed agreement, he contends the government stated he had fully and truthfully provided all available information and evidence. Although conceding he ultimately rejected this agreement, Immendorf argues the government's representation in this un-executed agreement should be admissible to prove he provided substantial assistance, qualifying him for a reduction in offense level under U.S.S.G. § 3E1.1.

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[12] Massanova was on probation during this period. The determination that the drug conspiracy continued until this date therefore resulted in the assessment of two additional criminal history points under the Sentencing Guidelines.

As we held in United States v. Singh, it is within the discretion of the District Court to accept or reject stipulations made in plea agreements. See 923 F.2d. 1039, 1043-44 (3d Cir.), cert. denied, 500 U.S. 937 (1991). Because this stipulation agreement was never executed, the District Court is not bound by the statements made by the government. See id.; see also United States v. Ketcham, 80 F.3d 789, 791 (3d Cir. 1996). As the District Court stated at sentencing, "it would be unfair and would inhibit ... negotiations if the defendant could take advantage of a proposed stipulation that was not agreed to by defendants."

But there is a more persuasive reason. Noting that Immendorf had not accepted the government's stipulation agreement and had gone to trial, the District Court stated Immendorf had "[n]ot accepted responsibility for [his] conduct .... That's a matter particularly for the court to assess under the totality of the circumstances, and I find that that has not occurred here."

We agree. Since it is within the discretion of the sentencing court to determine whether a defendant has provided substantial assistance or acceptance of responsibility, and the Court has based its decision on valid factual findings, its decision was not clearly erroneous. See Singh, 923 F.2d at 1043-44. We will affirm.

VII. Conclusion

For the foregoing reasons we will affirm the judgments of conviction and sentences.

APPENDIX B

Not Reported in F.Supp.
(Cite as: 1999 WL 761136)

UNITED STATES OF AMERICA
v.
Fred MASSANOVA
UNITED STATES OF AMERICA
v.
Steven IMMENDORF

United States District Court, E.D. Pennsylvania
No. 98-CR-631-02
Sept. 21, 1999

Dennis J. Cogan, Dennis J. Cogan & Associates, Phila, PA, George Henry Newman, Newman and McGlaughlin, P.C., The Benjamin Franklin, Phila, PA, Peter Goldberger, Law Offices of Peter Goldberger, Ardmore, PA, for Fred Massanova, Defendant.

Dina Keever, U.S. Attorney's Office, Phila, PA, Michael A. Schwartz, AUSA, U.S. Attorney's Office, Philadelphia, PA, for U.S.

Jeffrey M. Miller, Nasuti & Miller, Phila, PA, Arthur R. Shuman, Wyndmoor, PA, for Steven Immendorf, Defendant.

MEMORANDUM

BARTLE, J.

*1 Defendants Fred Massanova and Steven Immendorf were found guilty by a jury of conspiracy to distribute

marijuana, in violation of 21 U.S.C. § 846. Defendant Immendorf was also found guilty of possession of marijuana with intent to distribute and maintaining a marijuana storage facility, in violation of 21 U.S.C. §§ 841(a)(1), 856(a)(2). Presently before the court are the motions of Massanova and Immendorf for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure.[1] Immendorf has also moved pursuant to Rule 29 of the Federal Rules of Criminal Procedure for a judgment of acquittal as to the charge of possession of marijuana with intent to distribute.[2]

Before the trial began, Massanova filed a motion to suppress statements made on June 14, 1996 at his home, when FBI agents arrived to conduct a search pursuant to a warrant. The motion to suppress was granted in part and denied in part. Following the court's ruling and before trial, the government provided to defendants a clarifying letter setting forth the statements that were not suppressed. After receipt of the government's letter, defendant Immendorf renewed an earlier motion to sever

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[1] Rule 33 reads: "On a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require." Fed.R.Crim.P. 33.

[2] Rule 29 states, in relevant part: "The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses .... If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal." Fed.R.Crim.P. 29(a), (c).

his trial from that of Massanova. We denied Immendorf's motion.

The trial commenced on April 28, 1999. The government presented evidence that, from 1994 to 1996, Massanova and his cousin Immendorf were involved in marijuana trafficking. Massanova supplied money to a man named Clifton Cato, who arranged for the actual purchases of marijuana in Arizona and occasionally Philadelphia. Cato testified for the government. Sometimes Massanova provided him with money up front, before a trip west to purchase marijuana, and sometimes Massanova bought marijuana from Cato after Cato had it delivered to Philadelphia. At the direction of Massanova, from time to time Cato also picked up money from Immendorf. Meetings between Cato and Massanova to arrange for purchases took place at various locations, including Massanova's home and his sandwich shop in Philadelphia. Massanova and Cato recruited people to courier the marijuana from Arizona to Philadelphia. One of the couriers was Richard Bessinger, Sr., who also testified for the government. Cato estimated that from 1994 to 1996 he made over 30 trips west to purchase marijuana and sold Massanova approximately 4,000 pounds of it.

According to Cato, on numerous occasions Massanova arranged for the marijuana to be delivered to Immendorf's home on Longspur Place in Philadelphia. Immendorf (and sometimes Massanova) supervised the deliveries, weighed the marijuana, repackaged it into smaller plastic bags, and stored it in a "hidden compartment" under the stairway in Immendorf's basement.

Special Agent Charles Murray of the FBI testified that on June 14, 1996, he arrived at Massanova's home to

conduct a search pursuant to a warrant. Upon arrival at Massanova's home, he and another agent, Special Agent Sidney Perry, spoke to the defendant in his kitchen for approximately an hour. During this time, the agents asked Massanova to cooperate in their investigation of his marijuana dealings. Agent Murray testified that in response Massanova said "he was reluctant to do so, because if he did, he would have to provide information about some friends." (Tr. April 29, 1999, at 21). Neither Massanova nor Immendorf took the stand at trial.

*2 On May 3, 1999, the jury returned a verdict of guilty on each count of the indictment.

I.

Defendant Immendorf first contends that the court erred in denying his pretrial motion to sever pursuant to Rules 12 and 14 of the Federal Rules of Criminal Procedure. Rule 12(b) reads, "Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion.... The following must be raised prior to trial: ... Requests for a severance of charges or defendants under Rule 14." Fed.R.Crim.P. 12(b). Rule 14 provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Fed.R.Crim.P. 14.

Immendorf requested a severance on the ground that if the government was permitted to offer Massanova's statement implicating "friends," which

Massanova made in the kitchen of his home to Agents Murray and Perry, joinder of the two defendants would be prejudicial to Immendorf and deny him his constitutional right to confront a witness against him. U.S. Const. amend. VI. In support of his argument, he cites *Bruton v. United States,* 391 U.S. 123 (1968), *Richardson v. Marsh,* 481 U.S. 200 (1987), and *Gray v. Maryland,* 118 S.Ct. 1151 (1998).

Massanova's actual kitchen statement, as memorialized by the FBI agents in their 302 Report was, "to [cooperate] he would have to implicate close life long friends." Before Massanova's kitchen statement was offered into evidence through Agent Murray, Immendorf objected that it too strongly suggested a reference to him, especially considering the testimony of at least two government witnesses that the two men were cousins. The court redacted the statement to omit the words "close life long" so as to leave only "to cooperate he would have to implicate friends." At trial, as previously noted, Agent Murray testified that when he asked Massanova to cooperate, Massanova replied that "he was reluctant to do so, because if he did, he would have to provide information about some friends." At that point, the court inquired at sidebar whether Immendorf desired the court to give a cautionary instruction. Immendorf's counsel expressly waived such an instruction.

"There is a preference in the federal system for joint trials of defendants who are indicted together." *Zafiro v. United States,* 506 U.S. 534, 537 (1993); *see also United States v. Balter,* 91 F.3d 427, 432 (3d Cir. 1996). Joint trials promote judicial efficiency and help to avoid inconsistent verdicts. *See Zafiro,* 506 U.S. at 537; *Richardson,* 481 U.S. at 210. "Rule 14 does not require

severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion." *Zafiro,* 506 U.S. at 538-39. Severance should be granted "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id.* at 539.

***3** In *Bruton,* the defendant was tried jointly with an alleged accomplice, Evans, on charges of armed postal robbery. 391 U.S. at 124. The prosecution was permitted to offer evidence of Evans' oral confession that he and Bruton committed the robbery. *See id.* The statement "expressly implicat[ed]" Bruton. *Id.* at 124 n. 1. The judge gave the jury a cautionary instruction that it was not to consider "in any respect" the confession of Evans when it assessed the guilt or innocense of Bruton. *Id.* at 125 n. 2. Evans never testified. In reversing the conviction of Bruton, the Supreme Court explained, "Evans' confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination, since Evans did not take the stand." *Id.* at 128. The Court concluded that the limiting instruction was not sufficient to cure the prejudice to Bruton.

The Supreme Court dealt with the issue again in *Richardson.* There, defendants Marsh, Martin, and Williams were charged with assaulting a woman and murdering her son and aunt during a home robbery. Marsh and Williams were tried jointly. At trial, the state offered Williams' confession, which had been redacted to omit any references to Marsh. *See Richardson,* 481 U.S. at 203. The judge instructed the jury that Williams' state-

ment was not to be used against Marsh. After the state rested, Marsh testified that she accompanied Williams and Martin to the victims' home and was present during the robbery, but that she did not know anyone had been harmed and had not intended to rob or kill anyone. *See id.* at 204. Williams did not take the stand. Marsh was convicted of two counts of felony murder and one count of assault. The Supreme Court said, "the confession was not incriminating on its face, and became so only when linked with evidence introduced later at trial (the defendant's own testimony)." *Id.* at 208. The Court held that because the confession had been redacted to omit references to Marsh's name and her existence and the court had given the jury a limiting instruction, there was no violation of the Confrontation Clause of the Sixth Amendment to the Constitution. *See id.* at 211.

The Supreme Court faced the issue most recently in *Gray.* Defendants Bell and Gray were charged with murder and tried together. Bell's confession, in which he expressly implicated Gray, was offered into evidence. It was redacted, however, so that Gray's name was not mentioned, and in its place, the police detective who read Bell's statement at trial said the word "deleted" or "deletion." *Gray,* 118 S.Ct. at 1153. A written version of the confession was also admitted in evidence. Where Gray's name had been mentioned, it had been deleted and a blank space appeared. *See id.* The judge gave a limiting instruction. Bell did not testify. Both defendants were convicted. Reviewing *Bruton* and *Richardson,* the Supreme Court determined and concluded that the type of redaction used in *Gray* did not "reduce significantly or ... eliminate the special prejudice that the *Bruton* Court found." *Id.* at 1155. The critical difference between *Gray*

and *Richardson,* the Court explained, was the kind of inference made to connect the non-confessing defendant to the confession. In *Gray,* the prominent deletions made the inference "obvious[ ]" and "immediate[ ]." *Id.* at 1157.

*4 We do not believe Massanova's statement facially incriminated Immendorf. Unlike the situation in *Bruton,* Massanova's statement did not expressly reference Immendorf. Unlike *Gray,* the statement admitted into evidence did not simply have Immendorf's name redacted and replaced with a prominent blank space or the word "delete." Nor did the admitted statement include specific details about Immendorf, like his hair color, weight, or height. However, Immendorf argues that the statement became incriminating when the government offered evidence of the familial relationship between him and Massanova. To the contrary, the introduction of evidence that the two men were cousins, in our view, reduced the likelihood that the jury would infer that Massanova had been referring to Immendorf when he implicated "friends." Normally, when a person is making reference to a cousin, one uses the appellation "cousin," and not "friend," even though the relatives may in fact be quite friendly.

Moreover, the statement the jury heard did not indicate that it had been redacted. The redactions to the statement that were made here were similar to those recommended in *Gray.* There, the Court stated:

> Additional redaction of a confession that uses a blank space, the word "delete," or a symbol ... normally is possible. Consider as an example a portion of the confession before us: The witness who read the confession told the jury that the confession (among other things) said,

"Question: Who was in the group that beat Stacey?

"Answer: Me, deleted, deleted, and a few other guys." ...

Why could the witness not, instead, have said:

"Question: Who was in the group that beat Stacey?

"Answer: Me and a few other guys."

Gray, 118 S.Ct. at 1157. Like the Supreme Court's example, in which words could have been eliminated so that the statement implicated simply "a few other guys," words in this case were removed so that the statement implicated simply "friends," rather than "close life long friends."

Even if the statement was somehow incriminating of Immendorf, we believe that any prejudice to him could have been eliminated or significantly reduced by a cautionary instruction, just as it was in *Richardson.* Immendorf, however, waived such an instruction.

For all of these reasons, we conclude that there was no violation of Immendorf's Sixth Amendment right to confront witnesses against him, and the motion to sever was properly denied.

II.

Massanova next contends that the court erred when it determined that he was not "in custody" when the FBI agents questioned him in his kitchen and, therefore, it erred when it admitted his and the agents' kitchen statements. Massanova had filed a pretrial motion to suppress all statements he made to FBI agents on June 14, 1996. We held a pretrial hearing on the motion, during which we heard the testimony of one of the FBI agents and Massanova himself, among others. As noted

above, the court granted the motion in part and denied it in part, with findings of fact and conclusions of law stated on the record in open court. We determined that Massanova had not been subjected to a custodial interrogation when the FBI agents first questioned him in the kitchen of his home, but that he was in custody when the agents followed him upstairs and also when he and the agents left his home and he was taken to a nearby hotel room where he was questioned.

*5 The findings of fact included the following:

> On June 14th, 1996, between 6:00 a.m. and 6:30 a.m., FBI Agents Sidney Perry and Charlie Murray arrived at the home of defendant, Fred Massanova, at 2022 Shunk Street, Philadelphia, Pennsylvania. Prior to that date the agents had obtained a search warrant for the premises, as well as for Massanova's business, which is located a mile or so away. Upon arrival at the Massanova home the two agents knocked on the door several times. Mr. Massanova answered the door....
>
> The agents told Massanova that they were with the FBI, showed identification and explained they were there to conduct a search of his home. They asked to speak to Mr. Massanova about cooperating with their investigation. Massanova and the two agents proceeded to the kitchen where they all sat at the kitchen table. Each agent was wearing a gun in his hip holster, which Massanova observed. Agent Perry told Massanova that he was facing very serious charges, including charges for selling marijuana[,] and could potentially receive many years in prison. The agent informed him, however, that if he cooperated with the agents, the Court would take his

cooperation into consideration when sentencing him. Agent Perry told Massanova it was in his interest to talk to him.

[Agent Perry] also said there was a team of agents awaiting nearby who were going to conduct a search of [Massanova's] home[,] and the search would take place regardless of whether he cooperated or not. If he cooperated, however, the search would be discreet. While the three were seated at the kitchen table, Massanova heard his wife Donna stirring upstairs. He called to her. He then left the table and walked toward the bottom of the stairs, still in the line of sight of the agents. He told his wife the two FBI agents were in the house and why. Donna Massanova at some point joined her husband and the agents in the kitchen. Agent Perry repeated that it was in Massanova's interest to cooperate, that he was facing serious charges and potentially many years in jail. They told him they had a good deal of evidence against him.

Massanova asked questions of the agents, including what it meant to cooperate. Two or three times he asked to confer with his wife out of the range of hearing of the agents. The agents permitted him to do so. Massanova struggled with his decision about whether to cooperate with the agents. He asked if he would be required to talk about his friends[. T]he agents said yes. The agents also informed him he could stop cooperating at any time. Agents Perry and Murray spoke to Massanova at the kitchen table for approximately one hour. Massanova never left their line of sight.

At no point did the agents tell Massanova that he was "under arrest." On the other hand, they never told him he was not under arrest.... Agents Perry and Murray saw that Massanova's wife and children were upset[,] and more agents began to arrive to conduct the search, creating more distractions from their interview. Agent Perry suggested that they go with Massanova to another location in order to talk. Massanova agreed. Massanova asked if he could first take a shower because he was groggy. While the agents consented, they followed him upstairs. They searched the bedroom and adjoining bathroom, which opened into the bedroom, and then let Massanova go in to change. They told the defendant he had to keep the bathroom door open while he showered so that he would remain in their sight. The agents stayed in Massanova's bedroom while he showered.

***6** After the defendant had showered and changed his clothes, Agent Perry suggested that Massanova take his own car and Perry would ride with him [,] while Agent Murray drove the agent[s'] car. Agent Perry searched Massanova's car before Massanova was permitted to get inside. Agent Perry, riding as a passenger in Massanova's car, told Massanova to follow Murray. Agents Murray and Perry and Fred Massanova drove for about ten to 15 minutes. At approximately 8 a.m. they arrived at the Guest Quarters Hotel, near the Philadelphia Airport. They checked into a suite that had a bedroom and separate living room area....

Agent Perry [then] began interviewing Massanova at the table in the living room. The interview lasted

> approximately four and a half hours[. I]t was not tape recorded. Agent Perry took only a half page of notes. Mr. Massanova was not asked to sign any statements. During the interview Massanova continued to struggle with his decision to cooperate. Neither at his house on Shunk Street nor at the hotel did the agents ever give Massanova any *Miranda* Warnings or tell him that he should have an attorney present....
>
> Massanova felt comfortable with Agent Perry and called him by his first name. Throughout the day, neither agent physically threatened Massanova or his family.

(Tr. April 22, 1999, docket no. 85, at 3-9).[3]

The Fifth Amendment privilege against self-incrimination forbids the government from offering statements given by a defendant during a custodial interrogation when the suspect was not given *Miranda* warnings. The warnings include informing the individual of his right to remain silent, that any statement he makes may be used against him, that he has a right to an attorney, and that he has a right to have an attorney appointed to represent him if he is indigent. *See Miranda v. Arizona,* 384 U.S. 436, 444 (1966). A suspect is "in custody" if he has been "deprived of his freedom of action in any significant way." *Id.* The ultimate inquiry is whether there was a formal arrest or a restraint on the individual's freedom of movement of the degree associ-

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[3] Docket numbers are noted for certain transcripts in order to avoid confusion about citations. For some days, excerpts of the proceedings were transcribed and docketed separately.

ated with a formal arrest. *See California v. Beheler,* 463 U.S. 1121, 1125 (1983) (per curiam).

We are to make an objective inquiry to determine whether a reasonable person in the defendant's position would have felt that he was free to terminate the interview and leave. *See Thompson v. Keohane,* 516 U.S. 99, 112 (1995). A law enforcement officer's knowledge or suspicions about an individual may bear upon the custody issue only if they are conveyed to the individual being questioned. *See Stansbury v. California,* 511 U.S. 318, 325 (1994) (per curiam). Simply because an individual is questioned in an environment familiar and comfortable to him, such as his home, rather than in the station house, does not conclusively establish that he was not in custody. *See Orozco v. Texas,* 394 U.S. 324, 326-27 (1969). It is also not determinative that the defendant was never actually told that he was under arrest. We are to evaluate the totality of the circumstances.

*7 Massanova obviously was subjected to an interrogation by Agents Perry and Murray on June 14, 1996, at his home and later at the hotel. The government conceded that Agents Perry and Murray did not give Massanova any *Miranda* warnings. The only issue was whether he was, at any point, "deprived of his freedom of action in any significant way" in a manner consistent with formal arrest. *Miranda,* 384 U.S. at 444; *see also Beheler,* 463 U.S. at 1125.

When the agents spoke to Massanova and his wife at the kitchen table, they inevitably placed some pressure on him to cooperate when they told him about the serious charges and potential prison term he faced. They made it clear to him that charges for selling marijuana were going to be brought against him. However, they

made no promise to him that his cooperation would affect any sentence he received. They made no physical threats. They told Massanova only that the judge would take into account his cooperation. Perry and Murray were laying out Massanova's options, keeping their explanation simple and understandable. During his conversation with the agents in the kitchen, Massanova was permitted to confer with his wife any time he requested. The agents told Massanova that they had a lot of incriminating evidence against him, but that is just one of the factors we are to consider in determining whether a reasonable person in the defendant's place would have felt like he was in custody. *See Stansbury,* 511 U.S. at 325. Although it was a close case, a reasonable person would not have understood at that point, during the conversation in Massanova's kitchen, that he was under arrest. Massanova was not "deprived of his freedom of action in any significant way" while the agents questioned him in the kitchen. *Miranda,* 384 U.S. at 444. In fact, at one point he left the kitchen to call to his wife who was upstairs. We conclude that Massanova was not in custody during the conversation that took place in his kitchen. Therefore, any statements he made at that time were not inadmissible due to the failure of the agents to give him *Miranda* warnings.

Although our ruling that the defendant was in custody from the time he left his kitchen until he was told he could leave the hotel room is not challenged here, we think it is helpful to contrast what happened in Massanova's kitchen to what happened later. After the conversation in the defendant's kitchen, Massanova was permitted by the agents to shower and change his clothes, but they searched the bedroom and bathroom before

Massanova was allowed in, made him keep the bathroom door open while he showered, and remained in his bedroom while he showered and changed. The agents' presence in his bedroom and their request that Massanova keep the bathroom door open was such an extraordinary limitation on his ability to move about in his own house that we concluded he was in custody at that point. Under the circumstances, a reasonable person would not have felt he was at liberty to terminate discussions with the agents and leave, or to ask them to leave. After Massanova, Perry, and Murray left the bedroom, the agents' close supervision of Massanova continued. Agent Perry searched Massanova's car before he got in, and Perry told Massanova he would ride with him in the car. The agents took him from his house to the more isolated and less comfortable environment of a room in the Guest Quarters Hotel, for the sole purpose of interviewing him. They did not let him out of their sight. They questioned the defendant in the hotel room for over four hours. We concluded that Massanova was in custody from the time the agents followed Massanova up to his bedroom and supervised his shower and change of clothes, until he was told by the agents that he was free to leave the hotel room. Because Massanova was never given *Miranda* warnings and informed of his rights, the statements he made during the time he was in the agents' custody were suppressed.

III.

*8 The defendants next argue that the government violated Rule 16 of the Federal Rules of Criminal Procedure by its late production of the statement Massanova made in his kitchen. Rule 16 reads:

(a) Governmental Disclosure of Evidence.

(1) Information Subject to Disclosure.

(A) Statement of Defendant. Upon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The government must also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial.

....

(d) Regulation of Discovery.

....

(2) Failure To Comply With a Request. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or

inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

Fed.R.Crim.P. 16(a)(1)(A) and (d)(2).

Agent Perry recorded in a FBI 302 Report a summary of the statements Massanova made on June 14, 1996. The defendants received a copy of the report in advance of trial, and they do not contend that its disclosure was untimely. The 302 Report provides in relevant part:

> On June 14, 1996, FRED MASSANOVA was contacted at his residence.... MASSANOVA was advised of the identity of the interviewing agents ... and the fact that a search warrant had been issued for execution at his residence and his restaurant.... Prior to initiating the searches, MASSANOVA and the interviewing agents discussed MASSANOVA cooperating in the continuing investigation. The interviewing agents, together with MASSANOVA and his wife discussed this matter for approximately an hour. Throughout this period MASSANOVA was very reluctant to cooperate, stating that for him to do so he would have to implicate close life long friends. At the conclusion of this discussion, MASSANOVA stated that he was willing to cooperate, but also reserved the right to discontinue his cooperation at any time.
>
> Based on MASSANOVA's agreement to cooperate, a room was obtained at the GUEST QUARTERS HOTEL in Philadelphia where the interview of MASSANOVA was initiated.

> MASSANOVA confirmed that over the years he had purchased marijuana from several individuals to include [individuals not indicted in this criminal action]....
>
> *9 MASSANOVA was then questioned concerning a supplier named CATO. According to MASSANOVA, he met CATO approximately two years ago.... MASSANOVA then confirmed that he had purchased from CATO for approximately one year. During this period MASSANOVA purchased between 50 and 100 pounds on each occasion and paid between a thousand fifty dollars to eleven hundred fifty dollars per pound.

As previously discussed, the court, on April 22, 1999, suppressed that portion of Massanova's statements made after Massanova and the agents left the kitchen. On April 27, 1999, the government provided to the defendants a clarifying letter detailing those statements Massanova made to the agents before he and the agents left the kitchen. Included in the April 27 letter was the following:

> The agents told Fred Massanova they had a search warrant and that they were investigating him for his involvement with marijuana. They asked him to cooperate. He asked them what he would have to do if he cooperated. He was told his cooperation would possibly include testifying at trial and making consensual recordings. He said to cooperate he would have to give up close life long friends. He said he would cooperate but he wanted to be able to stop cooperating at any time.

Massanova argues that the government violated Rule 16 because the 302 Report stated generally that Massanova was questioned about "the continuing investigation" of "this matter," but the April 27 letter stated more specifically that the agents told Massanova that he was being investigated "for his involvement with marijuana."

In essence, Massanova complains that the government disclosed varying accounts of *the FBI agents'* statements. Rule 16(a)(1)(A) requires the United States to "disclose to the defendant the substance of any other relevant oral statement made by the defendant ... in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial." Fed.R. Crim.P. 16(a)(1)(A). We will assume for the purposes of this motion that Rule 16 compels disclosure of what law enforcement agents said to a suspect.

In any event, Rule 16 only requires the government to provide the *substance* of oral statements. It does not compel the government to hand over verbatim transcripts of those statements. Although the initial paragraphs of the 302 Report said generally that Massanova was asked to cooperate in "the continuing investigation," the rest of the 302 Report was rife with Massanova's statements about his marijuana dealings. The report summarized the defendant's statements about those dealings with Cato, one of the government's prime witnesses against him, for a one year period in and around 1994 to 1995. Additionally, the report notes that Massanova discussed his history of marijuana dealings with other individuals who are not named as defendants in this action. Assuming Rule 16 applies to statements made by law enforcement officials, we believe that the 302 Report set

forth the substance of the agents' remarks to Massanova. Accordingly, the government fully complied with Rule 16 when it provided the defendants with the 302 Report.

*10 Furthermore, Massanova was on notice that the agents told him he was being investigated for his marijuana trafficking. At the April 19, 1999 hearing on the suppression motion, Massanova testified about what took place in his kitchen on June 14, 1996 as follows:

Q And what did Agent Perry say to you?

A Told me that I was in a lot of trouble.

Q Tell us specifically.

A That I could be facing 20 years in prison and it would be to my best if I would cooperate with them.

Q Did he tell you what you were facing 20 years in prison for? Did he tell you what it was that they were there for?

A Yeah, for selling large amounts of marijuana.

(Tr. April 19, 1999, docket no. 100, at 27). Massanova's testimony indicates he was aware that the agents asked him, in his kitchen, to cooperate in their investigation of his involvement with marijuana transactions. Clearly he was not prejudiced by the failure of the 302 Report to set forth that specific information.

Even if the 302 Report were deficient because it did not state specifically that the agents asked Massanova about his marijuana dealings, the government's April 27, 1999 letter brought it into compliance with Rule 16. The letter was provided shortly after the suppression hearing and before trial.

Accordingly, the government did not violate Rule 16 with respect to the statements made in Massanova's kitchen on June 14, 1996, and no sanction was warranted

pursuant to Rule 16(d)(2) of the Federal Rules of Criminal Procedure.[4]

IV.

Massanova and Immendorf argue that a new trial is warranted because the court improperly ruled that the government was permitted to turn over to the defense a redacted Drug Enforcement Agency report summarizing the debriefing of Cato, one of the government's chief witnesses, and a redacted version of Cato's grand jury testimony.

The defendants objected to the production of the redacted documents on April 19, 1999, at the suppression hearing. The government argued that it was entitled to withhold the redacted portions of the documents because they concerned matters which were not only unrelated to the conspiracy at issue in this case but which were also the subject of ongoing criminal investigations. The court ordered the government to produce the unredacted documents for an in camera inspection. On April 22, 1999, after making the inspection, the court ordered the government to turn over to the defense a section of one page of Cato's grand jury testimony. It otherwise denied the defense motion to compel the government to produce any additional information.

The defendants contend that the unredacted versions of these documents should have been produced pursuant to Rule 26.2 of the Federal Rules of Criminal

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[4] We have reviewed the defendants' other arguments with respect, to the kitchen statements, namely that their admission violated Rule 403 of the Federal Rules of Evidence and that the agents' kitchen statements were inadmissible hearsay. We find these arguments to be without merit.

Procedure; the Jencks Act, 18 U.S.C. § 3500; and the *Brady* doctrine.

Rule 26.2 provides:

> (a) Motion for Production. After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the government ... to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.
>
> *11 ....
>
> (c) Production of Excised Statement. If the other party claims that the statement contains privileged information or matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that are privileged or that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party.
>
> ....
>
> (f) Definition. As used in this rule, a "statement" of a witness means:
>
> (1) a written statement made by the witness that is signed or otherwise adopted or approved by the witness;
>
> (2) a substantially verbatim recital of an oral statement made by the witness that is recorded

> contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or transcript thereof; or
>
> (3) a statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury.

Fed.R.Crim.P. 26.2(a), (c), (f). For our purposes, the Jencks Act mirrors Rule 26.2, although the two provisions are not identical. Both define "statement" in the same way. Herein they will be considered the same. The *Brady* doctrine, on the other hand, requires the government to disclose material evidence that is favorable to the defendant. *See Brady v. Maryland,* 373 U.S. 83, 87 (1963).

To prove a violation of *Brady,* a defendant must demonstrate that: (1) the prosecution suppressed or withheld evidence; (2) the evidence was favorable; and (3) it was material to the defense. *See United States v. Perdomo,* 929 F.2d 967, 970 (3d Cir. 1991). The touchstone for Rule 26.2, the Jencks Act, and *Brady* is relevance. If the redacted portions of the documents were not related to the case at hand, they need not have been produced.

Based upon our in camera review of the documents, with the exception of the section of the one page we ordered to be produced, we determined that the redacted portions were not relevant to the conspiracy at issue in this case. Nor were they relevant to the matters about which Cato and agent Richard Reck[5] of the Drug

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[5] The Drug Enforcement Agency report recounting Cato's debriefing does not qualify as a "statement" by Cato because

Enforcement Agency testified. Accordingly, Rule 26.2, the Jencks Act, and *Brady* did not compel their disclosure.

V.

The defendants argue that the court's failure to compel the government to turn over the "rough" notes of the government agents who testified at trial was error. They contend that Rule 26.2 of the Federal Rules of Criminal Procedure, the Jencks Act, and the *Brady* doctrine required disclosure.[6]

Rule 26.2 and the Jencks Act only require the government to produce statements if they have been "signed or otherwise adopted" or approved by the witness. Fed.R.Crim.P. 26.2(f)(1); 18 U.S.C. § 3500(e)(1). It has long been established in this Circuit, however, that agents' rough notes do not constitute "statements" under this standard unless the agents took some step to show they had adopted or approved the draft. *See United States v. Ramos,* 27 F.3d 65, 69-70 (3d Cir. 1994); *United States v. Ammar,* 714 F.2d 238, 259 (3d Cir. 1983). None of the agents did so here.

*12 Defendants have not proven there was a violation of *Brady.* The defendants have presented nothing to

_____(continued)

he had not signed it or otherwise adopted it as his own. *See* Fed.R.Crim.P. 26.2(f)(1); 18 U.S.C. § 3500(e)(1). We assume for present purposes, however, that it qualifies as a statement of Agent Richard Reck of the Drug Enforcement Agency, who testified at trial.

[6] The text of Rule 26.2 is set forth above. For purposes of our present discussion, the Jencks Act will be considered to require the same thing as Rule 26.2.

show that the rough notes of any of the government agents contained evidence that was favorable to them. There was no suggestion by any witness that the final reports differed in any way from earlier drafts. Mere speculation is not a sufficient basis for finding a *Brady* violation. *See Ramos,* 27 F.3d at 71. The argument that the government was obligated to produce the agents' rough notes is without merit.

VI.

Both defendants complain that the court abused its discretion under Rule 611(b) of the Federal Rules of Criminal Procedure and the Confrontation Clause of the Constitution by disallowing recross-examination of government witnesses. They contend that the court enforced a blanket prohibition on recross-examination.

Rule 611 does not expressly address redirect or recross-examination. It provides, in relevant part:

> (a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
>
> (b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

Fed.R.Crim.P. 611(a), (b). The Confrontation Clause reads, "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. The Court of Appeals for the Third Circuit has determined that when "material new matters" are elicited on redirect examination, the Confrontation Clause requires that the defendant be given the right of recross-examination on the new matters. *United States v. Riggi*, 951 F.2d 1368, 1375 (3d Cir. 1991). A denial of a defendant's right to recross-examine a witness on a material new matter covered on redirect does not mandate a new trial if the denial was harmless beyond a reasonable doubt. *See id.* at 1376. Whether a denial was harmful depends on "the importance of the witness' testimony, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case." *Id.*

The defendants point to three instances where they say recross-examination was improperly denied. First, they argue that they should have been permitted to recross-examine government witness Clifton Cato when it was brought out on redirect that he first learned about the June 14, 1996 search of Massanova's home from "a mutual friend of me and Fred." (Tr. April 29, 1999, at 13). The matter of when and how Cato learned about the search at Massanova's home was not a new one. It had been explored on cross-examination:

> *13 Q Well, you said that what you remember is that you continued to deal -- your frame of reference was you continued to sell to Massa-

nova until you learned *from someone else* that Massanova's place --

A Yeah.

Q was searched in June of 1996 and you were upset that he didn't let you know, isn't that right?

A Yes.

(Tr. April 28, 1999, docket no. 102, at 205 (emphasis added)). Accordingly, recross-examination on this same topic was properly denied.

Second, the defendants contend that they should have been permitted to recross-examine government witness Richard Bessinger, Sr., when on redirect he testified concerning Massanova's retirement from the drug business. Again, this matter had already been explored by defense counsel on cross-examination. (*See* Tr. April 29, 1999, at pp. 78-80). The court was not mandated to allow recross-examination on the same issue.

Third, the defendants state that the government brought out on redirect, for the first time, testimony from FBI Special Agent Mary Beth Kepner about a pager number she said belonged to Immendorf. This argument lacks merit for a number of reasons. It was not a new matter. During Agent Kepner's direct examination, government exhibit 29, a summary of Massanova's mobile telephone records, was admitted into evidence without objection. That exhibit had one column showing calls to "Immendorf's Beeper 215-819-0845." Referring to the exhibit, Agent Kepner testified on direct examination that it showed "calls made from Mr. Massanova's telephone ... to Immendorf's beeper number," and that it showed "157 calls to Immendorf's beeper number." (*Id.* at pp. 170-71). Moreover, Immendorf's counsel called

Agent Kepner as a defense witness and questioned her on direct examination about Immendorf's pager number. (*See* Tr. April 30, 1999, docket no. 104, at p. 65).

For all of these reasons, the court did not abuse its discretion under Rule 611 of the Federal Rules of Criminal Procedure or violate the defendants' rights under the Confrontation Clause of the Constitution by disallowing recross-examination.[7]

VII.

Massanova and Immendorf argue that the government's closing argument was improper and that the court's response was insufficient to cure the resulting harm. During the government's rebuttal, the Assistant United States Attorney stated:

> Now, I told you a few minutes ago that I was going to tell you what this case -- what's going on here, what this case is all about. There is a theory that I heard about when I was in law school and lawyers know this theory that if the law is against you, you attack the facts. And if the facts are against you, you attack the other party, that's the strategy. And what's going on in this courtroom all week is that plan by the defense.
>
> They first said, well let's try to attack Clifton Cato.... It didn't work, he was credible....
>
> Well, the defense had to regroup. We better think of plan C, let's attack the Government,

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[7] We also conclude that the defendants' argument that the court violated Rule 611 and the Confrontation Clause by restricting the cross-examination of Richard Bessenger is without merit.

let's make the Government look like there is this hidden conspiracy. The U.S. Attorney's Office, the DEA, the FBI, the FBI lab in Washington that analyzed the fingerprints, we're all involved.... And we all got together and we created a bunch of lies against Massanova and Immendorf because we want to convict two innocent men.

*14 That's what you have to believe to believe the defense theory. Don't be fooled, ladies and gentlemen, that is not what's going on here. What's going on here is an attempt by the defense to make you think that this is a Government conspiracy. That there is a hidden deal here to get Clifton Cato out of jail, to get Richard Bessinger probation sentence and to put these men in jail instead, because we don't like them, but we like Clifton Cato and we like Richard Bessinger, we the Government chose to let these defendants go because we want them.

Does that make sense, ladies and gentlemen? That these agents would take the stand and swear under oath to this evidence and put their careers on the line to convict two innocent men of marijuana trafficking and to let convicted -

MR. COGAN: Objection, objected to.

THE COURT: I think yeah, I'll sustain it.

MS. KEEVER: And to let two other convicted traffickers --

MR. COGAN: It was sustained, you Honor, I object.

THE COURT: Yes, move onto the next argument.

(Tr. April 30, 1999, docket no. 104, at pp. 113-15). Moments later, before ending for that Friday, the court instructed the jury:

> THE COURT: Members of the jury, I just want to tell you that the lawyers are not allowed to what we call vouch for witnesses. In other words, they can't tell you whether they believe a witness or they don't believe a witness. That's a matter for you to decide. And to the extent any of the attorneys in the closings said that they believe a witness or they don't believe a witness, you should totally disregard that, because it's not their job to--their job is to present the evidence and to argue about it, but not to say whether they believe it or they don't believe it. That's for you to decide, without any help from them on that particular issue.

(Tr. April 30, 1999, docket no. 147, at 117-18). Closing arguments were completed on a Friday. The following Monday, before the jury was charged, Immendorf's counsel again requested a curative instruction, and Massanova's attorney joined in that request. The court instructed the jury as follows:

> Before I give you your instructions, I just want to make one further clarification. The prosecution and the defense attorneys are only permitted to argue guilt or innocence of the defendants based on the evidence that was [ad]duced at the trial and nothing else. The personal opinions of lawyers is not relevant and must be disregarded. Whether or not the Government and others conspired to prosecute innocent persons is not the issue and that is not a matter for you to take

into consideration. Again, your decision must be based solely on the evidence in the case and nothing else.

(Tr. April 30, 1999, docket no. 105, at p. 2). The defendants now argue that because the court's instructions to the jury did not squarely place blame on the government for the prosecutor's improper closing statements, a new trial is necessary.

It is well settled that a prosecutor is not permitted to vouch for the credibility of a government witness. *See United States v. Molina-Guevara,* 96 F.3d 698, 704 (3d Cir. 1996). A prosecutor vouches for a witness when he or she makes some assurance of that witness's credibility that appears to be based upon personal knowledge or information that was not presented at trial. *See United States v. Walker,* 155 F.3d 180, 184 (3d Cir. 1998). Vouching is prohibited because it creates a danger that the jury may assume the prosecutor is privy to evidence against the defendant that was not presented at trial. Reliance by the jury on information not in evidence would violate the defendant's Sixth Amendment right to a fair trial. *See Molina-Guevara,* 96 F.3d at 704-05; *Walker,* 155 F.3d at 184. It may also violate the defendant's Sixth Amendment rights by convincing the jury that it should trust the government's judgment over its own view of the evidence. *See id.*

*15 We recognize that in some parts of the above-quoted segment of her closing argument, the prosecutor merely set forth what she thought defense counsel was asking the jury to believe. We also think it is understandable, in light of some portions of one defense counsel's closing arguments, that the prosecutor believed the overall integrity of the FBI's investigation was being chal-

lenged. Nonetheless, the prosecutor's remarks in this case constituted improper vouching. Specifically, when the prosecutor told the jury "[d]on't be fooled," and then addressed the theory that there was a possible government conspiracy against defendants, saying, "that is not what's going on here," she suggested that she had personal knowledge that her witnesses had not conspired against the defendants. Additionally, it was improper for the prosecutor to respond: "Does that make sense, ladies and gentlemen? That these agents would take the stand and swear under oath to this evidence and put their careers on the line to convict two innocent men." There was no evidence of what might put an FBI agent's career "on the line." The remark intimated that the prosecutor knew the agents to be honest individuals who would not jeopardize their careers by lying.

The government argues that even if there was vouching by the prosecutor, it was proper under the "invited response" or "invited error" doctrine. *United States v. Dispoz-O-Plastics. Inc.,* 172 F.3d 275, 285 (3d Cir. 1999); *Molina-Guevara,* 96 F.3d at 705. Under this doctrine, a prosecutor's improper comments will not be cause for a new trial if they were a "'reasonable response to improper attacks by defense counsel,'" and they were defensive in nature. *Walker,* 155 F.3d at 186 n. 5 (citation omitted). The Court of Appeals for the Third Circuit has explained, "We have generally found the invited response doctrine to be applicable only in instances where the prosecution team was attacked for reasons unsupported by the evidence at trial." *Dispoz-O-Plastics,* 172 F.3d at 285. After reviewing the trial transcript and closing arguments of defense counsel, we conclude that no such instances occurred in this case.

Even if a prosecutor's improper comments were not justified under the invited response doctrine, a new trial is not necessary if the comments were harmless error. *See United States v. Mastrangelo,* 172 F.3d 288, 297 (3d Cir. 1999). In order to assess whether the error was harmless, we look to: "the scope of the improper comments in the overall trial context, the effect of any curative instructions given, and the strength of the evidence against the defendant." *Id.*

We believe the error here was harmless. The evidence against the defendants was very strong and virtually uncontradicted. At the beginning of the trial, the jury was instructed, "if I tell you not to consider a particular statement you must put that statement out of your mind and you may not refer to that statement in your later deliberations." (Tr. April 26, 1999, docket no. 132, at p. 86). The defendant's objection to the prosecutor's improper remarks was immediately sustained, and she was told to move on to her next argument. Furthermore, before the jury was instructed on the law, the court twice gave a firm curative instruction specifically directed to the prosecutor's remarks. The court stated, among other things, "Whether or not the Government and others conspired to prosecute innocent persons is not the issue and that is not a matter for you to take into consideration. Again, your decision must be based solely on the evidence in the case and nothing else." (Tr. April 30, 1999, docket no. 195, at p. 2). We do not think it is necessary for a curative instruction to place blame. In addition to the curative instruction, the court told the jury at the beginning and the end of the trial that it was to decide the case based solely upon the evidence presented at trial and that what the lawyers say in their openings,

closings, and other statements, arguments, and questions is not evidence. (Tr. April 26, 1999, docket no. 132, at 84-86; Tr. May 3, 1999, at 3-4). Based upon the three considerations outlined in *Mastrangelo,* the court possesses a "sure conviction" that the improper comments did not contribute to the jury's verdict. *Mastrangelo,* 172 F.3d at 297. Consequently, the prosecutor's closing is not grounds for a new trial.

VIII.

*16 The defendants argue that it was an abuse of discretion to provide the jury with a copy of the indictment that included allegations of "manner and means" and "overt acts" because these allegations were not part of "the essential facts constituting the offense charged." Fed.R.Crim.P. 7(c)(1). The allegations to which the defense points as surplusage detailed the charged conspiracy and were supported by evidence at trial. The court also instructed the jury at the beginning and end of the trial that the indictment is not evidence. (Tr. April 26, 1999, docket no. 132, at 82; Tr. May 3, 1999, at 6). We do not believe there was any error in providing the jury with the indictment.

IX.

Immendorf moves pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure for a judgment of acquittal on the charge of possession with intent to distribute marijuana. He contends that he is entitled to be acquitted on the charge because (1) there was no evidence at trial that he had been observed at the home in which the marijuana was found, (2) he was not present when the drugs were found, and (3) there was no evidence that he had been involved with marijuana transactions after mid-1996.

We must view the evidence in the light most favorable to the government, draw reasonable inferences from the evidence in the government's favor, and uphold the jury's verdict unless we determine that no rational jury could have found beyond a reasonable doubt that the defendant committed the crime charged. *See United States v. Ashfield*, 735 F.2d 101, 106 (3d Cir. 1984). In order to prove the defendant was guilty of possession with intent to distribute, the government had to prove: (1) Immendorf possessed marijuana; (2) he did so knowingly; and (3) he intended to distribute the marijuana. *See* 21 U.S.C. § 841(a)(1).

The government proved that in November, 1998, government agents, conducting a search pursuant to a warrant, found over 400 grams of marijuana at a home on Longspur Place in Philadelphia. The government presented a deed which demonstrated that from at least 1993 to January, 1999, Immendorf owned the premises. The marijuana was found in a concealed compartment under the stairway in the basement of the home. Government witness Cato testified that he had, from time to time in 1994 through 1996, delivered marijuana to Immendorf at Longspur Place and that he observed Immendorf place the drugs into the hidden compartment for storage. The government also presented evidence that during the November, 1998 search, documents were found in the house addressed to Immendorf at that location. In addition, the agents conducting the search discovered marijuana packaging materials, a heat sealer, and other paraphernalia typically used to weigh and store marijuana.

This evidence was sufficient for a reasonable jury to find the defendant guilty beyond a reasonable doubt on

the charge of possession with intent to distribute marijuana.

X.

*17 Accordingly, for all of the above reasons, the motions of defendant Fred Massanova and defendant Steven Immendorf for a new trial will be denied, and the motion of Steven Immendorf for a judgment of acquittal will also be denied.

ORDER

AND NOW, this 21st day of September, 1999, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the motions of defendants Fred Massanova and Steven Immendorf for a new trial and the motion of defendant Steven Immendorf for a judgment of acquittal are DENIED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 99-1876 & 99-1892

UNITED STATES OF AMERICA

v.

FRED MASSANOVA,
Appellant at No. 99-1876

STEVEN IMMENDORF,
Appellant at No. 99-1892

D.C. Criminal Nos. 98-cr-00631-1 & 98-cr-00631-2

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge, SLOVITER, MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO and FUENTES, Circuit Judges.

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having

voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/A J Scirica
Circuit Judge

Dated: DEC 06 2000